

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF NEW YORK

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TERRIE L. H.,

Plaintiff,  
v.

Civil Action No.  
5:21-CV-1234 (DEP)

COMMISSIONER OF SOCIAL  
SECURITY,

Defendant.

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APPEARANCES:

OF COUNSEL:

FOR PLAINTIFF

LAW OFFICES OF  
KENNETH HILLER, PLLC  
6000 North Bailey Ave, Suite 1A  
Amherst, NY 14226

JUSTIN GOLDSTEIN, ESQ.

FOR DEFENDANT

SOCIAL SECURITY ADMIN.  
6401 Security Boulevard  
Baltimore, MD 21235

JUNE L. BYUN, ESQ.

DAVID E. PEEBLES  
U.S. MAGISTRATE JUDGE

ORDER

Currently pending before the court in this action, in which plaintiff

seeks judicial review of an adverse administrative determination by the Commissioner of Social Security (“Commissioner”), pursuant to 42 U.S.C. §§ 405(g) and 1383(c)(3) are cross-motions for judgment on the pleadings.<sup>1</sup> Oral argument was conducted in connection with those motions on December 19, 2022, during a telephone conference held on the record. At the close of argument, I issued a bench decision in which, after applying the requisite deferential review standard, I found that the Commissioner’s determination did not result from the application of proper legal principles and is not supported by substantial evidence, providing further detail regarding my reasoning and addressing the specific issues raised by the plaintiff in this appeal.

After due deliberation, and based upon the court’s oral bench decision, a transcript of which is attached and incorporated herein by reference, it is hereby

ORDERED, as follows:

- 1) Plaintiff’s motion for judgment on the pleadings is GRANTED.
- 2) The Commissioner’s determination that plaintiff was not

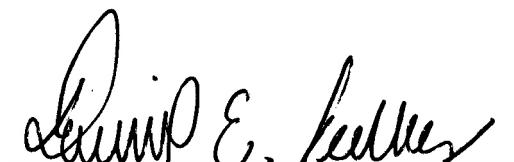
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<sup>1</sup> This matter, which is before me on consent of the parties pursuant to 28 U.S.C. § 636(c), has been treated in accordance with the procedures set forth in General Order No. 18. Under that General Order once issue has been joined, an action such as this is considered procedurally, as if cross-motions for judgment on the pleadings had been filed pursuant to Rule 12(c) of the Federal Rules of Civil Procedure.

disabled at the relevant times, and thus is not entitled to benefits under the Social Security Act, is VACATED.

3) The matter is hereby REMANDED to the Commissioner, without a directed finding of disability, for further proceedings consistent with this determination.

4) The clerk is respectfully directed to enter judgment, based upon this determination, remanding the matter to the Commissioner pursuant to sentence four of 42 U.S.C. § 405(g) and closing this case.



David E. Peebles  
David E. Peebles  
U.S. Magistrate Judge

Dated: December 29, 2022  
Syracuse, NY

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK

-----x  
TERRIE H.,

Plaintiff,

-v-

5:21-1234

COMMISSIONER OF SOCIAL SECURITY,

Defendant.

-----x  
**TRANSCRIPT OF PROCEEDINGS**

**BEFORE THE HONORABLE DAVID E. PEEBLES**

December 19, 2022

100 South Clinton Street, Syracuse, New York

For the Plaintiff:

LAW OFFICE OF KENNETH HILLER  
6000 North Bailey Avenue  
Suite 1A  
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BY: **JUSTIN M. GOLDSTEIN, ESQ.**

For the Defendant:

SOCIAL SECURITY ADMINISTRATION  
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BY: **JUNE L. BYUN, ESQ.**

*Hannah F. Cavanaugh, RPR, CRR, CSR, NYACR, NYRCR  
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TERRI H. v. SOCIAL SECURITY

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1 (The Court and all counsel present by telephone.

2 || Time noted: 2:30 p.m.)

3 THE COURT: Let me begin by thanking counsel for your  
4 excellent presentations.

5 The background of this case is as follows -- I should  
6 lead off by pointing out that plaintiff has commenced this  
7 action pursuant to 42, United States Code, Sections 405(g) and  
8 1383(c) (3) to challenge a finding by the Acting Commissioner of  
9 Social Security that she was not disabled at the relevant times  
10 and therefore ineligible for the Title XVI benefits for which  
11 she applied.

Plaintiff was born in December of 1969 and is currently 53 years of age. She was 50 at the time of the application for benefits on May 7, 2020. Plaintiff lives in a house in Hannibal, New York with her boyfriend and a daughter who, in April of 2021, was 18 years old. There is also indication of the -- in the record that at one point there was also another person residing -- I believe it was a grandson or granddaughter.

Plaintiff stands 5'4" to 5'6" in height depending on where in the record you look and has weighed between 138 and 150 pounds at various times. She has a 10th education and no GED. She was in regular classes while in school. Plaintiff possesses a driver's license.

25 The plaintiff stopped working in September of 2010.

1 She claimed, at 2018 to 2019 of the Administrative Transcript,  
2 it was to raise her children. At page 44, during the hearing,  
3 she said it was due to her stress and stomach issues. The  
4 plaintiff has worked as a bartender, a cashier, and a service  
5 desk helper in a grocery store. She also told Dr. Shapiro and  
6 testified at the hearing at page 45 that she was a waitress for  
7 three weeks in 2017. According to 484 of the Administrative  
8 Transcript, she lost that job when the business closed.  
9 Plaintiff apparently has never held a full-time job.

10 Physically, plaintiff suffers from degenerative disc  
11 disease of the lumbar and cervical spine. She suffers from  
12 amblyopia from birth, and that is a lazy eye; GERD;  
13 hypertension; hyperlipidemia; tinnitus; trigeminal neuralgia,  
14 which affects, as I understand it, the teeth and face area; IBS,  
15 and headaches. Plaintiff was hospitalized in 2006 with IBS or  
16 colitis, and in 2019 with dehydration, high blood pressure, and  
17 some dental issues.

18 Mentally, plaintiff suffers from depression, anxiety,  
19 and an adjustment disorder. She has never been psychiatrically  
20 hospitalized. Plaintiff's primary physician is Dr. Michael  
21 Miller. She also sees a Nurse Practitioner Beverly Aubin. For  
22 vision, she sees Dr. Anthony Mondo. She also treats with North  
23 Country Neurology, Dr. Samah Mohiuddin, and Connex Care Fulton  
24 where she sees a therapist, LCSW Ashley Gilbert, between two and  
25 three times per month. She has also consulted with Syracuse

1 Orthopedics or SOS, including Dr. Richard DiStefano and  
2 Physician's Assistant Thomas Vanarnam.

3 In terms of daily activities, plaintiff can dress,  
4 bathe, groom, cook, clean, do laundry, shop, drive. She does  
5 not take public transportation. She is able to socialize with  
6 family and friends. She enjoys crafts. She watches television,  
7 listens to music. She goes on social media. She takes care of  
8 her plants and can go to the family camp or cottage. Plaintiff  
9 is a smoker, although there's no quantification that I could see  
10 of how much and how often.

11 Procedurally, plaintiff applied for Title XVI  
12 Supplemental Security Income payments on May 7, 2020, alleging  
13 an onset date of June 1, 2017, which was amended to May 7, 2020,  
14 later to coincide with the filing of her application. In her  
15 function report at 218 of the Administrative Transcript, she  
16 stated that her disabling conditions include lazy eye, poor  
17 vision, back impairment, degenerative discs, teeth problems,  
18 high blood pressure, and anxiety.

19 On April 7, 2021, a hearing was conducted with a  
20 vocational expert by Administrative Law Judge Kenneth Theurer.  
21 The Administrative Law Judge subsequently issued an unfavorable  
22 decision on April 15, 2021. That decision became a final  
23 determination of the agency on September 28, 2021, when the  
24 Social Security Administration Appeals Council denied  
25 plaintiff's request for a review. This action was commenced on

1 November 15, 2021, and is timely.

2           In his decision, ALJ Theurer applied the familiar  
3 five-step sequential test for determining disability. At step  
4 one, he concluded that plaintiff had not engaged in substantial  
5 gainful activity.

6           At step two, he concluded that plaintiff suffers from  
7 severe impairments that impose more than minimal limitations on  
8 her ability to perform basic work functions, including  
9 trigeminal neuralgia, degenerative disc disease of the cervical  
10 spine and lumbar spine, amblyopia, depressive disorder, and  
11 anxiety disorder.

12           At step three, he concluded that none of those  
13 conditions meet or medically equal any of the listed  
14 presumptively disabling conditions set forth in the  
15 Commissioner's regulations, specifically considering listings  
16 1.15, 2.02, 2.04, 2.07, 11.14, 12.06, and 12.04, and  
17 additionally considered plaintiff's headaches under listing  
18 11.02 and SSR, or Social Security Ruling, 19-4p. After  
19 surveying the record, ALJ Theurer concluded that plaintiff  
20 retains the residual functional capacity, notwithstanding her  
21 conditions, to perform light work subject to additional physical  
22 and mental limitations.

23           Applying that RFC finding at step four, he noted that  
24 plaintiff has no past relevant work and proceeded to step five  
25 where, with the benefit of testimony from a vocational expert,

1 the ALJ concluded that plaintiff is capable of performing  
2 available work in the national economy, notwithstanding her  
3 conditions, citing as representative positions those of laundry  
4 aide, hand packager, and housekeeper, and therefore concluded  
5 that plaintiff was not disabled at the relevant times.

6 As you know, the Court's function in this case is  
7 extremely limited. The standard to be applied is very  
8 deferential. The Court must determine whether substantial  
9 evidence supports the conclusion reached and correct legal  
10 principles were applied. Substantial evidence is defined as  
11 such admissible evidence as a reasonable mind would find  
12 sufficient to support a conclusion.

13 In this case, plaintiff has raised four basic  
14 contentions that are actually a part of the first. The  
15 plaintiff contends that the ALJ's RFC determination is not  
16 supported. The plaintiff also claims that his step two  
17 rejection of headaches -- a headache disorder as severe was  
18 erroneous. She argues that the ALJ's analysis of the medical  
19 opinions in the record is flawed. And four, she challenges the  
20 Administrative Law Judge's consideration of her subjective  
21 symptomology, what we used to call credibility, under SSR 16-3p.

22 Of course, the first task for an Administrative Law  
23 Judge is to determine a claimant's RFC, which represents a  
24 finding of the range of tasks she is capable of performing  
25 notwithstanding her impairments. Ordinarily, an RFC represents

1 the claimant's maximum ability to perform sustained work  
2 activities in an ordinary setting on a regular and continuing  
3 basis, meaning eight hours a day for five days a week, or an  
4 equivalent schedule. An RFC determination is informed by  
5 consideration of all of the relevant medical and other evidence  
6 and, of course, must be supported by substantial evidence.

7 In this case, there are physical and mental  
8 conditions and resulting limitations, and there are several  
9 medical opinions in the record. Physically, there are  
10 statements from Dr. Elke Lorensen and prior administrative  
11 findings of Dr. A. Saeed and Dr. Stradley. Mentally, there's an  
12 opinion from consultative examiner Dr. Jeanne Shapiro, prior  
13 administrative findings of Dr. L. Haus, and Dr. M. D'Ortona, and  
14 an opinion from Licensed Clinical Social Worker Ashley Gilbert.

15 When it comes to evaluation of medical opinions, this  
16 case is subject to the new regulations that apply to cases where  
17 the application for benefits was filed after March 27, 2017.  
18 Under those regulations, the Commissioner will not defer or give  
19 any specific evidentiary weight, including controlling weight,  
20 to any medical opinions, including those from medical sources,  
21 but rather will consider whether those opinions are persuasive  
22 by primarily considering whether the opinions are supported by  
23 and consistent with the record in the case. An ALJ must  
24 articulate his or her determination as to how persuasive he or  
25 she finds all of the medical opinions and must explain how he or

1 she considered the supportability and consistency of those  
2 opinions. There are other factors under 20 C.F.R. Section  
3 416.920c that must be considered, although the Administrative  
4 Law Judge is not required to discuss how he or she evaluated  
5 those additional factors.

6 In this case, the focus of plaintiff's threshold  
7 argument is actually -- her counsel phrased it, is on the  
8 opinion of Dr. -- I'm sorry, Licensed Clinical Social Worker  
9 Ashley Gilbert, which was given on February 22, 2021. It  
10 appears at pages 719 to 721 of the Administrative Transcript.  
11 It's not terribly limiting, but it does, after recounting  
12 plaintiff's signs and symptoms to include generalized persistent  
13 anxiety and sleep disturbance, conclude that plaintiff is  
14 seriously limited, but not precluded, from the following two  
15 areas that apply to employment: Complete a normal workday and  
16 workweek without interruptions from psychologically-based  
17 symptoms and performing -- perform at a consistent pace without  
18 an unreasonable number in length of rest periods.

19 The therapist does not find plaintiff is unable to  
20 meet competitive standards or has no useful ability to function  
21 in any of the specified categories or subcategories of mental  
22 abilities and aptitudes needed to do unskilled work. The  
23 criteria seriously limited, but not precluded, is defined to  
24 mean the ability to function in this area is seriously limited  
25 and less than satisfactory, but not precluded, in all

1 circumstances.

2                   The Administrative Law Judge discussed this opinion  
3 at pages 21 and 22 of his opinion and found it to be less  
4 persuasive. The rationale given was -- was as follows: First,  
5 it noted the progress notes from Ms. Gilbert were not submitted  
6 and, additionally, her opinion is less persuasive because the  
7 findings are not supported by any treatment records, her  
8 estimate of absence of four or more days per month is  
9 speculative, and she does not provide any specific explanation  
10 for her responses other than giving checkbox answers and a brief  
11 notation that the claimant has anxiety in unfamiliar places.

12                  Plaintiff argues that because there are no treatment  
13 notes from Therapist Gilbert in the record, the analysis is  
14 flawed and the Administrative Law Judge failed to properly  
15 develop the record by making efforts to obtain those records.  
16 Plaintiff's counsel did, at page 40, note that he had no  
17 objection to the record as presently constituted without those  
18 therapist notes and that the record was complete at page 41.  
19 One could argue that on this basis alone there's no breach of  
20 the duty to develop the record. The duty stems from -- the duty  
21 requires a complete medical history for at least one year prior  
22 to the month in which the application was filed. That is  
23 specified in 20 C.F.R. Section 416.912. The -- and in 20 C.F.R.  
24 Section 404.15.20b, the regulations provide we will consider  
25 evidence to be insufficient when it does not contain all the

1 information we need to make our determination or decision.

2 There are cases that suggest that where, as here, the  
3 representative states that they're -- the record is complete,  
4 the duty to complete or to reach out and obtain additional  
5 materials has been absolved. One such case is *Orts v. Astrue*,  
6 2013 WL 85071 from the Northern District of New York, January 7,  
7 2013, District Judge Lawrence E. Kahn. He stated the following:  
8 An ALJ has taken reasonable steps when, as here -- that is to  
9 develop the record -- she asked a plaintiff's attorney at a  
10 hearing if the medical records before her were complete and the  
11 attorney answers affirmatively. Similarly, in *Opal R. v.*  
12 *Commissioner of Social Security*, 2022 WL 4485291 from the  
13 Western District of New York, September 27, 2022, finding  
14 similar.

15 In the abstract, perhaps one could argue that there  
16 was no further duty to develop the record. However, it is  
17 conspicuous -- in fact, the ALJ alludes to it specifically in  
18 his decision at page 22 -- that the -- all of the treatment  
19 notes from the person rendering the opinion, Ashley Gilbert, are  
20 missing from the record. The ALJ is -- was on notice from  
21 having reviewed the record that such notes exist. At page 572,  
22 from the first encounter date, February 10th -- I'm sorry, I'm  
23 going backwards -- first encounter date from May 27, 2022, which  
24 is where the beginning of the relevant period is, from May of  
25 2020 through to May 10, 2021, there are 1, 2, 3, 4, 5, 6, 7, 8,

1       9, 10, 11, 12, 13, 14, 15, 16 -- at least 17 notes referenced  
2 from Therapist Gilbert. The fact that the Administrative Law  
3 Judge noted that they were not submitted and obviously relied in  
4 part on the fact that treatment records did not support her  
5 conclusion, I find is error.

6                  I also note that the Administrative Law Judge, who is  
7 an experienced Administrative Law Judge, stated that the  
8 therapist was not a -- considered an acceptable medical source  
9 and cited to the regulation which applies to cases filed --  
10 claims filed prior to March of 2017. He cites to 20 C.F.R.  
11 Section 416.927, which doesn't apply in this case. This case is  
12 governed by 20 C.F.R. Section 416.920c, which provides that when  
13 a medical source provides one or more medical opinions or prior  
14 administrative medical findings, we will consider those medical  
15 opinions or prior administrative medical findings from that  
16 medical source together using the factors listed in paragraph  
17 (c) (1) through (c) (5) of the section as appropriate. And, of  
18 course, the first of those two factors are supportability and  
19 consistency.

20                  Admittedly, the therapist, even under the new  
21 regulations, is not an acceptable medical source as that term is  
22 defined in 20 C.F.R. Section 416.902a, but is a medical source  
23 as that is defined in 20 C.F.R. Section 416.902i. And so being  
24 a medical source, her opinion should have been analyzed under 20  
25 C.F.R. Section 416.920c and there should've been a discussion of

1 not only supportability, but consistency. There's absolutely no  
2 discussion of consistency in this case.

3 As counsel notes, the absence -- the fact that the  
4 form was a checkbox form is not necessarily fatal under *Hogan v.*  
5 *Kijakazi*, but I will say it is certainly bereft of much  
6 analysis, which could have been gleaned from the missing therapy  
7 records. The -- so I guess the question is -- I do find error  
8 in the analysis of Therapist Gilbert's medical opinion. The  
9 question is, is it harmful. That may -- it may be a close case.

10 As I said before, the opinion is not terribly  
11 limiting, but it is -- it is clear that the opinion regarding  
12 absences, about four days per month, is -- exceeds the limit of  
13 what the vocational expert testified to and what any vocational  
14 expert would testify to, and the seriously limited in the two  
15 categories is potentially problematic. The Court's simply not  
16 in a position to make the determination of whether this is or  
17 not -- this opinion from Ms. Gilbert, if credited, would be  
18 disabling, and so I think the case should be -- the  
19 Commissioner's decision should be vacated and the matter  
20 remanded for further consideration after proper efforts have  
21 been made to secure Therapist Gilbert's treatment records.

22 So I will grant judgment on the pleadings to the  
23 plaintiff, vacate the Commissioner's determination, and remand  
24 the matter to the agency without a directed finding of  
25 disability, and further proceedings consistent with this

1 opinion.

2 Thank you, both. I wish you happy holidays.

3 MR. GOLDSTEIN: Okay. Happy holidays.

4 MS. BYUN: Thank you, your Honor.

5 (Time noted: 2:55 p.m.)

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3 CERTIFICATE OF OFFICIAL REPORTER  
4  
5

6 I, HANNAH F. CAVANAUGH, RPR, CRR, CSR, NYACR,  
7 NYRCR, Official U.S. Court Reporter, in and for the United  
8 States District Court for the Northern District of New York, DO  
9 HEREBY CERTIFY that pursuant to Section 753, Title 28, United  
10 States Code, that the foregoing is a true and correct transcript  
11 of the stenographically reported proceedings held in the  
12 above-entitled matter and that the transcript page format is in  
13 conformance with the regulations of the Judicial Conference of  
14 the United States.

15  
16 Dated this 28th day of December, 2022.  
17

18 s/ Hannah F. Cavanaugh  
19 HANNAH F. CAVANAUGH, RPR, CRR, CSR, NYACR, NYRCR  
20 Official U.S. Court Reporter  
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